

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Feature Group IP Petition for Forbearance	)	
Pursuant to 47 U.S.C. § 160(c) from	)	WC Docket No. 07-256
Enforcement of 47 U.S.C. § 251(g),	)	
Rule 51.701(a)(1) and Rule 69.5(b)	)	
	)	
	)	
Petition of the Embarq Local Operating	)	
Companies for the Limited Forbearance	)	
Under 47 U.S.C. § 160(c) from	)	WC Docket No. 08-8
Enforcement of Rule 69.5(a), 47 U.S.C.	)	
§ 251(b), and the Commission Orders on the	)	
ESP Exemption	)	

**COMMENTS OF UNIPOINT ENHANCED SERVICES D/B/A POINTONE**

Ross A. Buntrock  
Jennifer Kashatus  
Womble Carlyle Sandridge & Rice, PLLC  
1401 Eye Street, NW—Seventh Floor  
Washington, D.C. 20005  
(202) 857-4479

*Counsel to PointOne*

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## SUMMARY

The Commission must grant Feature Group IP's petition to prevent carriers from assessing access charges on end user customers. There is no question that the Voice Embedded Internet-based communications at issue in Feature Group IP's petition fall squarely within the criteria set forth in the Communications Act of 1934, as amended (the "Act"), to be classified as information services. These services involve a net change in both form and content, which squarely include such services within the definition of information services and preclude such services from being classified as "telecommunications" or "telecommunications services." As such, there is no legal basis or public interest to be served by subjecting providers of Voice Embedded Internet-based communications to an access charge regime.

The Commission must affirm that IP-to-PSTN (or Voice Embedded Internet-based communications) are covered by the ESP exemption, and that the ESP exemption is necessary to preserve the growth of IP-based applications that are delivered via telecommunications networks. Since IP-to-PSTN traffic is included within the ESP exemption, it is not necessary to reach Feature Group IP's Section 10 forbearance request.

If the Commission, however, declines to include IP-to-PSTN traffic within the ESP exemption, then the Commission should exercise its forbearance authority and forbear from applying access charges to these providers. Feature Group IP has satisfied the statutory criteria for forbearance as discussed herein, and the public interest would be served by forbearing from applying access charges to IP-to-PSTN providers.

Furthermore, the Commission must deny Embarq's petition. Embarq cannot, and does not, satisfy the statutory criteria for forbearance relief. Notably, there is simply no basis to conclude that any interest (other than Embarq's own interest) would be served by granting Embarq's petition. To the contrary, granting Embarq's petition likely would stymie growth and deployment of new and innovative products and services, particularly to customers in rural and underserved areas where access charges frequently are extremely high. Moreover, removing IP-to-PSTN traffic from the ESP exemption while similarly maintaining the ESP exemption would unlawfully discriminate against IP-to-PSTN providers.

If the Commission determines that it is necessary to eliminate the ESP exemption altogether or to carve out IP-to-PSTN traffic from the ESP exemption, then it should do so as part of its *Developing a Unified Intercarrier Compensation Regime* reform docket. Failing to consider the ramifications of applying access charges to IP-to-PSTN traffic in the context of access charges as a whole would be detrimental to the public interest.

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**COMMENTS OF UNIPOINT ENHANCED SERVICES D/B/A POINTONE**

UniPoint Enhanced Services d/b/a PointOne (“PointOne”), an information service provider (“ISP”), through its attorneys and in accordance with the public notice issued in the above-captioned proceedings,<sup>1</sup> respectfully submits comments in support of the Petition of Feature Group IP (“Feature Group”) for Forbearance from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(a)(1) and Rule 69.5(b) (“Feature Group IP Petition”). PointOne also submits these comments in opposition to the Petition for Forbearance submitted by Embarq Local Operating Companies (“Embarq”) for Limited Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Rule 69.5(a), 47 U.S.C. § 251(b), and

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<sup>1</sup> *In the Matter of Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission’s Rules*, WC Docket No. 07-256, Order (rel. Jan. 14, 2008) (granting additional time to respond and requesting parties address forbearance petition filed by Embarq).

Commission Orders on the ESP Exemption (“Embarq Petition”).<sup>2</sup> The Commission should grant Feature Group IP’s petition and confirm that entities that provide Voice Embedded Internet-based communications, such as Feature Group IP and other similarly situated providers, fall within the Commission’s Enhanced Service Provider (“ESP”) exemption, such that those providers are properly treated as end users and are not subject to an access charge regime that is designed for carriers. At the same time, the Commission must deny Embarq’s petition, which seeks to impose an inapplicable access charge regime on this same group of providers.<sup>3</sup>

## **I. Introduction**

PointOne is a leading world-wide, facilities-based provider of Internet Protocol (IP)-enabled, enhanced information services, and is an end user of telecommunications services, under the Communications Act of 1934, as amended (the “Act”),<sup>4</sup> provided by telecommunications carriers, like Embarq. PointOne has deployed a state-of-the-art, Advanced IP Communications Network. This all-IP network enables PointOne to deliver robust and sophisticated “any-to-any” services to its customers. PointOne interconnects with, interacts, transmits, and routes IP traffic between any origination and termination facility or device (including wireline and wireless phones, computers, PDAs, wireless

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<sup>2</sup> Embarq filed its forbearance petition on January 11, 2008. The Commission consolidated comment for these petitions on January 14, 2008.

<sup>3</sup> In its petition, Feature Group IP refers to the class of end user customers for which it seeks relief as Voice Embedded Internet-based communications. Feature Group IP’s explains that “Voice Embedded Internet-based communications are a subset of Voice over Internet Protocol (“VoIP”) communications. For purposes of this petition, the terms “Voice Embedded Internet-based communications” and “IP-to-PSTN” are used interchangeably.

<sup>4</sup> 47 U.S.C. § 153(20).

devices, etc.) without discriminating based on the form or capability of the facility or device. For instance, PointOne is capable of both IP and TDM-based interconnection and can terminate voice traffic entering its network as an e-mail to a computer, a text message on a PDA, or a voice application on a SIP phone.

PointOne strongly supports Feature Group IP's petition, and urges the Commission to confirm that Voice Embedded Internet-based communications and services fall squarely within the ESP exemption, and, thus, are not subject to access charges. Indeed, by requesting that the Commission forbear from enforcing the ESP exemption to the same category of traffic at issue in Feature Group IP's petition, Embarq has admitted that such communications and services are covered by the ESP exemption. Because these communications and services fall within the ESP exemption, it is not necessary for the Commission to reach Feature Group IP's forbearance request.

If the Commission, however, declines to confirm that IP-to-PSTN traffic is within the ESP exemption, then it must forbear from applying any access charge regulations to these providers. As discussed below, the public interest will be served by forbearing from assessing access charge regulations on IP-to-PSTN providers. There are tremendous network effects and resulting consumer benefits of providing connectivity to all types of networks and end users. For example, PointOne offers services that can be used by any end user whether connected to PSTN or IP end points. IP infrastructure is an efficient, cost-effective and highly versatile method for delivering "custom-tailored" applications to consumers who might not otherwise have access to communications networks. If PointOne was to be required to contribute to the access charge regime, then it would be required to devote substantial resources to paying—and complying—with

such regulations and may be forced to rethink the services it provides and the locations in which it provides its services.

For these same reasons, the Commission must deny Embarq's forbearance petition. The Commission must not impose the existing economically irrational compensation scheme on IP-based services, which are not subject to the traditional common carrier telecommunications regulatory scheme. Further, Embarq does not, and cannot satisfy the section 10 forbearance standard as it cannot demonstrate how forbearing serves any interest other than its own.

Finally, if the Commission seeks to eliminate the ESP exemption or render it inapplicable to IP-to-PSTN traffic, then it should do so in the context of broader intercarrier compensation reform, in the *Developing a Unified Intercarrier Compensation Regime* docket, which embraces elimination of the antiquated access charge regime preserved in current regulations. Adopting Embarq's proposed forbearance scheme would add to the Commission's unsuccessful piecemeal approach and would detract even further from the Commission's stated goals of a uniform regime.

## **II. The ESP Exemption Includes IP-to-PSTN Providers**

The Commission need not reach the forbearance question raised in Feature Group IP's petition because IP-to-PSTN providers are exempt from access charges under the ESP exemption. PointOne, and other similarly situated providers, are not common carriers. These companies do not provide telecommunications or telecommunications services, and the access charge regime simply is inapplicable to them. To the contrary, the services that IP-to-PSTN providers offer and provide are consistent with the enhanced services for which the Commission specifically designed the ESP exemption.



**A. IP-to-PSTN Services Are Information Services And Are Covered Within the ESP Exemption, and the Public Interest Is Served by Retaining the ESP Exemption**

IP-to-PSTN services fall within the ESP exemption, because they are information services, not telecommunications services. Under the Act, information services are defined as, “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications....”<sup>5</sup> As the definition makes clear, a critical component of an information service is the ability of the user to control the form and content of the information that it transmits. This capability is precisely embodied in the IP-to-PSTN services at issue in Feature Group IP’s petition. As Feature Group IP explains, IP-to-PSTN services offer a net change in both protocol and content.<sup>6</sup> These services also offer an enhanced functionality,<sup>7</sup> and provide the user with the capability to combine voice services with Internet and other mediums so as to allow the user to define its own experience. As such, the IP-to-PSTN services at issue in Feature Group IP’s and Embarq’s petitions are information services and are exempt from access charges under the ESP exemption.

Even though IP-to-PSTN providers may offer services that originate and terminate on a “phone” on the PSTN, such termination only is made possible using advanced IP technology. IP-enabled services that ride over the physical network are wholly separate from the physical network. Any alleged similarity between an IP-

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<sup>5</sup> 47 U.S.C. § 153(20).

<sup>6</sup> See Feature Group IP Petition at 3, 21-22.

<sup>7</sup> See *id.* at 3.

enabled voice application and a circuit-switched service are not sufficient to compel the Commission to begin imposing traditional common carrier regulation on the application.

The distinction in the manner in which IP-to-PSTN providers access the PSTN embodies the purpose of the ESP exemption, and demonstrates that the public interest is served by maintaining this ESP exemption and in applying that exemption to IP-to-PSTN providers. In 1983, the Commission expressly determined that ESPs would be exempt from access charge requirements, even if an ESP might be using the local telephone service to originate and terminate communications.<sup>8</sup> Under this exemption, ESPs are treated as end users because they are not the carriers themselves. In 1997, the Commission affirmed the ESP exemption, reasoning that doing so was necessary to avoid disruption of the ever-evolving information services industry in order to promote the goals of the Telecommunications Act of 1996.<sup>9</sup> The Commission maintained the ESP exemption because enhanced service providers “do not use the PSTN in the same way as other carriers.”<sup>10</sup> In the present case, as described herein, IP-to-PSTN providers simply do not use the PSTN in the same manner as traditional providers of telecommunications. It is precisely this category of providers for which the Commission first created, and later maintained, the ESP exemption. Accordingly, there is no question that applying the ESP

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<sup>8</sup> *MTS/WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 715 (1983); *Access Charge Reform Order*, 12 FCC Rcd 15982, 16133, 16134 (1997).

<sup>9</sup> *See Access Charge Reform Order*, 12 FCC Rcd at 16133 (stating the ESP exemption is “necessary to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services”).

<sup>10</sup> *Embarq Petition* at 3 (citing *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 at ¶ 343 (1997), *pet. for rev. denied*, *Southwestern Bell Tel. Co.*, 153 F.3d 523 (8th Cir. 1998)).

exemption to today's IP-to-PSTN providers not only is consistent with the definition of the ESP exemption, but also is consistent with the underlying purpose for which the Commission created the exemption in the first instance.<sup>11</sup> To hold otherwise would undermine the ESP exemption.

Moreover, by filing its petition for forbearance, Embarq admits that IP-to-PSTN providers are information services providers that are covered by the ESP exemption. In its petition, Embarq takes great pains to try to distinguish IP-to-PSTN providers from information service providers, which the Commission already has specifically addressed as falling within the ESP exemption. Try as it might, Embarq cannot distinguish IP-to-PSTN providers from other providers that are covered by the ESP exemption, and, therefore, must resort to requesting that the Commission forbear from applying the ESP exemption to IP-to-PSTN providers. As discussed below, IP-to-PSTN providers do not offer or provide telecommunications or telecommunications services; a review of the services that they offer in comparison with the statutorily defined terms telecommunications and telecommunications services makes it even more clear that IP-to-PSTN providers offer information services and fall within the ESP exemption.

**B. IP-to-PSTN Providers Do Not Provide “Telecommunications” Or “Telecommunications Services”**

PointOne, Feature Group IP, and other providers that offer IP-based enhanced services may be classified as common carriers and subject to such regulation only if they

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<sup>11</sup> See *infra* at 12-15 (explaining that the public interest would be served by forbearing from applying the access charge regime to IP-to-PSTN providers due to the innovative products and services that they offer).

are providing telecommunications services, which they are not.<sup>12</sup> In its petition, Embarq argues that the ESP exemption does not apply to IP-to-PSTN traffic because that exemption does not apply to telecommunications providers. Yet nowhere in its petition can Embarq identify how IP-to-PSTN services legitimately can qualify as telecommunications services. Under the Act, “telecommunications” means the “transmission, between or among points specified by the user, of information of the user’s choosing, *without change in the form or content* of the information as sent and received.”<sup>13</sup> “Telecommunications service” means the “offering of telecommunications for a fee directly to the public, or to such classes of users to be effectively available to the public, regardless of the facilities used.”<sup>14</sup> As stated above, one of the many unique characteristics of IP-to-PSTN service is the ability of the customer to change the content and format of the information that it chooses to transmit. This capability alone removes the IP-to-PSTN service from the classification of the service as telecommunications or a telecommunications service.

Furthermore, IP-to-PSTN providers do not have rights—and have not claimed to have the rights—afforded to common carriers. For example, IP-to-PSTN providers do not have the right to interconnect with carriers. Nor do these providers have access to numbering resources. These providers also do not receive access charges, or other similar compensation, from carriers. As such, for all relevant purposes, these providers are treated as end users, not as providers of telecommunications, or telecommunications

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<sup>12</sup> 47 U.S.C. § 153(44).

<sup>13</sup> 47 U.S.C. § 153(43) (emphasis added).

<sup>14</sup> 47 U.S.C. § 153(46).

services. To deem IP-to-PSTN traffic as telecommunications would thwart the distinction between telecommunications and information services.

Affirming that the ESP exemption applies equally to IP-to-PSTN services as it does to any other enhanced or information service that the Commission already has addressed also would be consistent with well-established Commission practices to treat like services with regulatory parity. For example, recognizing the distinctions between IP-based video services and traditional cable services, IP-based video services are not subject to the same regulatory requirements of traditional cable companies. As one example, in October 2007, the Superior Court of Connecticut affirmed a state PUC ruling that AT&T was not required to obtain a cable license prior to offering its IP-based video service to the public.<sup>15</sup> In the present case, the Commission also should not treat IP-to-PSTN services as telecommunications services (or telecommunications). To do so would require the Commission to do a comprehensive overhaul of regulations as applied to IP-to-PSTN providers because the Commission simply cannot apply the burdens of contributing to the access charge regime to this category of providers without similarly permitting those providers to have access to interconnection, numbering resources, and other benefits that companies obtain by virtue of their status as telecommunications providers.

### **III. The Commission Should Address The Issues Raised In This Docket In The Comprehensive Intercarrier Compensation Reform Proceeding**

The Commission must not carve out classes of ESPs (such as IP-to-PSTN) providers from its ESP exemption; if the Commission wants to reevaluate the application

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<sup>15</sup> *Southern New England Tel. Co. v. Conn. Dep't of Pub. Util. Controls*, 2007 WL 3318257, at \* 8 (Conn. Super. Oct. 31, 2007).

of access charges to ESPs, then it only should do so as part of the comprehensive intercarrier compensation reform proceeding. The access charges at issue are inextricably linked to intercarrier compensation as a whole, and it is imprudent and unnecessary for the Commission to depart from its well-established practices designed to create regulatory parity. Moreover, adopting the proposals set forth in Embarq's petition without considering the access charge regime as a whole would have a detrimental effect on IP-based service providers and would not further in any way the Commission's efforts to address intercarrier compensation reform.

The "unified approach" to which the Commission repeatedly has referred could address any of the concerns that Embarq raised in its petition. Adopting Embarq's proposed forbearance would add to the Commission's piecemeal approach and would detract even further from the Commission's stated goal of a uniform regime. Moreover, there is no demonstrated need for the Commission to grant Embarq's petition.

For eleven years, the Commission repeatedly has expressed the need to reform intercarrier compensation regulations into a unified regime to eliminate regulatory arbitrage. Since the passage of the 1996 Act, the Commission repeatedly has emphasized its commitment to adopting a comprehensive intercarrier compensation framework in furtherance of Congress's goal of establishing a "pro-competitive, deregulatory national policy framework."<sup>16</sup> Toward that goal and in recognition of the failure of the intercarrier compensation regime then in place, in 2001, the Commission opened its

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<sup>16</sup> *Qwest Forbearance Petition*, 22 FCC Rcd at 5232, ¶ 48 and n.135 (citing Joint Explanatory Statement of the Committee Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996)).

*Developing a Unified Intercarrier Compensation Regime* reform docket.<sup>17</sup> In that docket, the Commission sought to harmonize the requirements for all carriers and to abolish the antiquated regime that was based on arbitrary regulatory classifications. To date, the Commission has failed to complete this task. If the Commission wants to remove the IP-to-PSTN traffic from the ESP exemption, then the Commission should address the issues raised in these Petitions for Forbearance in its comprehensive intercarrier compensation reform docket.

Feature Group IP's petition (along with the petition filed by Embarq) demonstrates the overwhelming need for the Commission to clarify the limits of the, admittedly antiquated, access charge regime established under the Act. Myriad parties in countless Commission proceedings have expressed a need for comprehensive intercarrier compensation reform and agree that adoption of a unified system is in the public interest.<sup>18</sup> In fact, in its own Petition for Forbearance, Embarq requests that such reform "must be done comprehensively."<sup>19</sup> Meanwhile, carriers remain subjected to an "interim" access charge regime, that is approaching its decade anniversary. Granting Feature Group IP's petition and confirming that the ESP exemption applies to IP-to-

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<sup>17</sup> *Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("NPRM"); *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4855 (2005) ("FNPRM").

<sup>18</sup> See, e.g., Comments filed on December 17, 2007 in the *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135. Nearly all commenters suggested that the Commission should deal with these issues in the comprehensive reform docket and should refrain from unnecessary piecemeal reform that creates additional regulatory burdens.

<sup>19</sup> Embarq Petition at v.

PSTN traffic is a step in the right direction toward unifying today's disparate intercarrier compensation regimes under section 251(g) of the Act. Affirming the ESP exemption upholds well-established Commission policy to treat like services with regulatory parity.

#### **IV. Feature Group IP's Request For Section 251(g) Forbearance Satisfies The Statutory Standard**

If the Commission declines to recognize that the ESP exemption applies to Voice Embedded Internet-based communications, then the Commission should grant Feature Group IP's petition and forbear from applying access charge regulations to IP-based service providers. Feature Group IP has satisfied the statutory criteria for forbearance. Section 160(a) of the Communications Act requires the Commission to grant forbearance if it determines that:

- enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;<sup>20</sup>
- enforcement of such regulation or provision is not necessary for the protection of consumers;<sup>21</sup> and
- forbearance from applying such provision or regulation is consistent with the public interest.<sup>22</sup>

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<sup>20</sup> 47 U.S.C. § 160(a)(1).

<sup>21</sup> *Id.* § 160(a)(2).

<sup>22</sup> *Id.* § 160(a)(3). In considering this public interest prong, section 10(b) directs the Commission to consider whether grant of forbearance "will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b).



In addition, the Commission is required to consider the competitive effect of granting a forbearance petition,<sup>23</sup> and these competitive effects can be part of the Commission's public interest analysis.<sup>24</sup>

Applying section 251(g) and its related price regulations to IP-to-PSTN providers is not necessary to ensure that the charges and practices of carriers "are just and reasonable and not unreasonably discriminatory."<sup>25</sup> Indeed, the exact opposite is true. Applying section 251(g) creates regulatory arbitrage by maintaining vastly disparate rates for identical functionality for no economic reason. Rather, section 251(g) is a tool for regulatory price discrimination and only by eliminating its application to IP-to-PSTN providers will the Commission be able to assure that rates are just and reasonable and not unreasonably discriminatory.

Similarly, application of section 251(g) and its pricing regulations to IP-to-PSTN providers is not necessary for the protection of consumers. As Feature Group IP explains, there is no rational argument that granting its petition would harm consumers.<sup>26</sup> To the contrary, the reverse is true: if the Commission were to deny Feature Group IP's petition and were to grant Embarq's petition (as discussed below), requiring IP-to-PSTN providers to pay access charges might create a disincentive for those providers to provide

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<sup>23</sup> *Id.*, § 160(b).

<sup>24</sup> *Id.*, § 160(a)(3).

<sup>25</sup> *Id.*, § 160(a)(1).

<sup>26</sup> See Feature Group IP Petition at 61 (stating that there is no basis to show that "the exclusive of IP-PSTN and incidental PSTN-PSTN Voice Embedded IP communications applications from the access charge regime would somehow lead to such substantial increases in end-user rates that those rates would become unaffordable.").

service to rural and underserved customers, in particular, and to continue to deploy unique and innovative services to all of their customers. PointOne and similarly situated providers are offering cutting edge services to interested consumers, many of whom do not have access to these services from traditional LECs. If PointOne suddenly were subject to the access charge regime, then it would be required to reevaluate its service offerings and would need to determine how to provide service under the new regulatory regime. The substantial resources that PointOne would be required to expend in order to comply with the newly imposed access charge regime no doubt would stymie growth and deployment.

Finally, Feature Group IP's forbearance request is consistent with the public interest and will promote competition by providing the Commission with a vehicle to unify intercarrier compensation rates, which is the stated Commission goal. IP-enabled services have flourished under the complementary scheme of (1) a hands-off approach to regulation of information services and applications, through the ESP exemption; and (2) safeguards against discrimination by last mile transmission or telecommunications service providers. Granting Feature Group IP's forbearance request would enable Feature Group IP, PointOne, and other ESPs to continue to develop and deploy innovative services to consumers throughout the United States.

The Commission should not abandon the ESP exemption. The current regulatory structure assumes that the application and the transport layers are closely tied; VoIP and other similar IP-enhanced services permit the separation and independence of the application (in this case, voice communications) and the transport layers. Affirmation of the applicability of ESP exemption is necessary to permit IP-enabled services to develop

the best solutions to meet critical social obligations. Regulation is only necessary when those obligations are not adequately addressed by the market—this is clearly not the case here.

#### **V. The Commission Must Deny Embarq’s Petition For Forbearance**

Embarq cannot satisfy the criteria for forbearance set forth in section 10, and the Commission must deny its petition. Embarq requests that the Commission forbear from applying the ESP exemption to IP-to-PSTN providers; interestingly, however, Embarq does not appear to be asking that the Commission forbear from applying the ESP exemption in its entirety. For the reasons discussed above, Embarq cannot demonstrate that forbearing from applying the ESP exemption to IP-to-PSTN providers will ensure that charges and practices are just and reasonable, not unjustly and unreasonably discriminatory, nor necessary for the protection of consumers. Moreover, the specific request in Embarq’s petition facially demonstrates that granting its petition in fact *would cause* discriminatory treatment. Embarq requests that the Commission remove only IP-to-PSTN providers from the ESP exemption. Doing so would result in discriminatory treatment, because IP-to-PSTN providers would be required to pay access charges while other ESPs would not be required to do the same. The Commission cannot justify such discrimination.

Most importantly, there is no public interest to be served by granting Embarq’s petition. Embarq claims that forbearance will “ensure a level playing field among service providers.”<sup>27</sup> As PointOne has already demonstrated, the playing field only will be disrupted if the Commission changes course and rules that the ESP exemption does not

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<sup>27</sup> Embarq Petition at 23.

apply to IP-to-PSTN services. Without the ESP exemption providers like PointOne would be effectively regulated as telecommunications providers, who are subject to the liabilities, but do not acquire any of the rights associated with this categorical classification. Imposing the burdensome regulatory obligations that telecommunications carriers would only hinder the ability of PointOne and other IP-based service providers to bring their enhanced service offerings to the public.

If PointOne were to be required to pay access charges, then it would have less of an incentive to deploy its products and services into higher cost areas. Because ESPs are not eligible to receive access revenue to defray the costs of their investments in these vital areas, it is not appropriate to require payment of the corresponding charges. Payment of access charges, with no return, acts as a disincentive for enhanced service providers to expand into otherwise undesirable areas and provide vital services. Section 251(g), and the regulations it preserves, maintains comparatively high rates for “access” services (services that incumbent providers, like Embarq, specialize in) and much lower rates for local services (services that competitors specialize in), such as traffic destined to users that happen to be ISPs even though the functionality provided by the underlying carrier is identical. Even if the Commission were to find that IP-to-PSTN providers were permitted to assess access charges—in exchange for being required to pay them—the extremely high rates of Embarq and similarly situated carriers would provide a disincentive for unique providers such as PointOne to continue to provide services in high cost areas. Thus, there is no public interest to be served by granting Embarq’s petition.

Further, contrary to Embarq's claim, the ESP exemption does not "confer an arbitrary and grossly unreasonable competitive advantage."<sup>28</sup> The Commission created the ESP exemption to promote the investment in and evolution of information services. The continued evolution of technologies renders the ESP exemption as important today as it was 25 years ago. Advanced IP services are able to thrive in a competitive environment when they are left untouched by outdated and burdensome regulations. Allowing the IP services to come to market creates competition, forces innovation, and ultimately benefits consumers in the form of lower prices and greater choice in service offerings. It would be senseless to eliminate the ESP exemption and forbear from applying it to IP-to PSTN communications. Forbearance will not protect investment in the PSTN, especially in rural America.

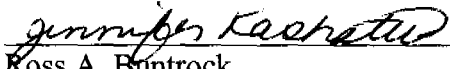
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<sup>28</sup> *Id.* at 25.

## **VI. Conclusion**

Consistent with the foregoing, the Commission should declare that enhanced service providers are not common carriers. Accordingly, the Commission should affirm the application of the ESP exemption and further re-affirm that it does apply to IP-to-PSTN communications facilitated by entities that offer advanced IP-based applications and services that are transported via the PSTN. In the alternative, the Commission should grant Feature Group IP's requested forbearance to eliminate regulatory arbitrage and unify intercarrier compensation rates. The Commission also should deny Embarq's petition for forbearance.

Respectfully Submitted,

  
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Ross A. Buntrock  
Jennifer Kashatus  
Womble Carlyle Sandridge & Rice, PLLC  
1401 Eye Street, NW—Seventh Floor  
Washington, D.C. 20005  
(202) 857-4479

*Counsel to PointOne*

February 19, 2008